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16 **UNITED STATES DISTRICT COURT**
 17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

18 In re: Stephen J.R. Goetz and Diana
 19 Goetz,

20 Debtors.

21 John Challas,

22 Plaintiff,

23 v.

24 Steven Goetz, and DOES 1 through 20,
 25 Inclusive,

26 Defendants.

27 Chapter 11

28 Case No. C-07-06364 RMW

[Bankruptcy Case No. 05-57623 MM
 Adversary Proceeding No. 06-5197
 BAP No. NC-07-1418]

**MEMORANDUM OF POINTS AND AUTHORITIES
 IN SUPPORT OF APPELLEE/PLAINTIFF JOHN
 CHALLAS' MOTION TO DISMISS THE APPEAL BY
 APPELLANT/DEFENDANT STEPHEN GOETZ**

Date: June 20, 2008

Time: 9:00 a.m.

Judge: Hon. Ronald M. Whyte
 Courtroom: 6, 4th Fl.

I. INTRODUCTION

By way of this motion, Plaintiff/Appellee John Challas ("Mr. Challas") requests that this Court dismiss Defendant/Appellant Stephen Goetz's ("Goetz") instant appeal. Although Goetz's appeal has now been pending for over six months, Goetz has made no effort to perfect his appeal. Also, Goetz, to

1 Mr. Challas' frustration, has repeatedly failed to attend case management conferences in this matter,
 2 underscoring that he has no intent to prosecute his appeal. These circumstances prejudice Mr. Challas,
 3 who is concerned that Goetz may be secreting assets. Given these circumstances, dismissal of Goetz's
 4 appeal is eminently appropriate.

5 **II. STATEMENT OF FACTS/RELEVANT PROCEDURAL HISTORY**

6 On October 19, 2007, and following a day-long evidentiary hearing which occurred on July 13,
 7 2007, the Bankruptcy Court for the Northern District of California, the Honorable Marilyn Morgan
 8 presiding, signed an Order ruling that Mr. Challas' cause of action for slander against Goetz was not
 9 within the parties' "fair contemplation" when Goetz filed for Chapter 11 bankruptcy, and therefore not
 10 discharged upon confirmation of Goetz's bankruptcy reorganization plan. (**Declaration of Daniel D.**
 11 **McGee** ["**McGee Decl.**"], ¶ 2; **Exh. 1.**) Said Order was entered on the Bankruptcy Court's docket on
 12 October 22, 2008. (*Ibid.*)

13 On November 1, 2007, Goetz, who is proceeding in pro per, appealed the October 19, 2007
 14 Order. (**McGee Decl.**, ¶ 3; **Exh. 2.**)

15 On November 1, 2007, Goetz, pursuant to **FRBP 8006**, also designated the entire docket for the
 16 underlying adversary proceeding to be included in the record on appeal, including the transcripts for
 17 hearings dated June 12 and July 13, 2007. (**McGee Decl.**, ¶ 4; **Exh. 3.**) In so doing, Goetz, pursuant
 18 to **FRBP 8006**, was required to immediately deliver to the reporter and file with the clerk a written
 19 request for the transcripts and make satisfactory arrangements for payment of its costs. (**McGee Decl.**,
 20 ¶ 4.) Goetz failed to perform these acts and has not taken any steps to cure the same. (*Ibid.*)

21 On November 6, 2007, the Bankruptcy Court referred Goetz's appeal to the Bankruptcy
 22 Appellate Panel ("BAP"). (**McGee Decl.**, ¶ 5; **Exh. 4.**) On November 13, 2007, the BAP transmitted
 23 to the parties its opening letter which indicated that Goetz had failed to transmit a copy of the order
 24 from which Goetz is appealing. (**McGee Decl.**, ¶ 5; **Exh. 5.**)

25 On November 26, 2007, Mr. Challas filed an objection to Goetz's appeal being heard and
 26 determined by the BAP. (**McGee Decl.**, ¶ 6; **Exh. 6.**) The appeal was thereafter transferred to this
 27 Court and assigned to the Honorable Ronald M. Whyte. (**McGee Decl.**, ¶ 6.)

1 On December 17, 2007, this Court set this appeal for an April 18, 2008 status conference
 2 pending the parties' perfection of the record on appeal. (**McGee Decl., ¶ 7; Exh. 7.**) Upon the filing
 3 of the record on appeal, this Court was to vacate the April 18, 2008 status conference at which time a
 4 briefing schedule would issue. (*Ibid.*)

5 On January 10, 2008, Mr. Challas filed a case management conference ("CMC") statement in
 6 the Bankruptcy Court in connection with a CMC which was set to occur on January 15, 2008. (**McGee**
 7 **Decl., ¶ 8; Exh. 8.**) Mr. Challas' CMC statement recited the aforementioned facts, including that
 8 Goetz had failed to comply with **FRBP 8006** or to otherwise perfect his appeal rendering his appeal
 9 subject to dismissal. (*Ibid.*) Mr. Challas also indicated that this Court had set the appeal for an April
 10 18, 2008 status conference. (*Ibid.*)

11 Goetz failed to file any CMC statement in connection with the January 15, 2008 CMC.
 12 (**McGee Decl., ¶ 9.**) Ultimately, Judge Morgan continued the Bankruptcy Court's CMC until
 13 December 9, 2008 pending the outcome of Goetz's appeal before this Court. (*Ibid.*)

14 On April 3, 2008, Mr. Challas filed his status conference statement in connection with this
 15 Court's April 18, 2008 status conference. (**McGee Decl., ¶ 9; Exh. 10.**) That status conference
 16 statement again indicated that Goetz had failed to perfect his appeal, and that dismissal of Goetz's
 17 appeal was warranted. (*Ibid.*) Goetz did not file any status conference statement in connection with
 18 the April 18, 2008 status conference. (*Ibid.*)

19 On April 18, 2008, Mr. Challas' attorneys appeared before this Court at the April 18, 2008
 20 status conference. (**McGee Decl., ¶ 11; Exh. 10.**) Once again, Goetz failed to appear at the April 18,
 21 2008 status conference. (*Ibid.*) Given these circumstances, including Goetz's failure to perfect his
 22 appeal, Mr. Challas' attorneys advised this Court that they would be bringing the instant motion to
 23 dismiss, which this Court recognized. (*Ibid.*)

24 Mr. Challas is concerned that Goetz may be secreting assets during this period of avoidance
 25 and delay. (**McGee Decl., ¶ 12.**) These concerns are not unfounded. (*Ibid.*) Even Goetz's own
 26 family successfully sued Goetz in state court for the fraud Goetz had allegedly perpetrated against his
 27 own parents. (**McGee Decl., ¶ 12; Exh. 11.**)

III. LEGAL ARGUMENT

FRBP 8006, in pertinent part, provides:

Any party filing a designation of the items to be included in the record shall provide to the clerk a copy of the items designated or, if the party fails to provide the copy, the clerk shall prepare the copy at the party's expense. If the record designated by any party includes a transcript of any proceeding or a part thereof, the party shall, immediately after filing the designation, deliver to the reporter and file with the clerk a written request for the transcript and make satisfactory arrangements for payment of its cost. All parties shall take any other action necessary to enable the clerk to assemble and transmit the record. (Emphasis added.)

In this regard, it is well established that an appellant's failure to perfect the appeal, including failure to timely request necessary transcripts, constitutes grounds for dismissal. See, e.g., Greco v. Stubenberg (BAP 9th Cir. 1988) 859 F.2d 1401, 1404 [an appellant's failure to take steps required to prosecute appeal, including failing to make a timely request for a transcript, is grounds for dismissal]; In re McCarthy (BAP 9th Cir. 1999) 230 B.R. 414, 417 [**FRBP 8006** requires, as mandatory, that an appellant designate a record that includes both any opinion, findings of fact and conclusions of law of the court, *and* any transcript that will be needed; failure to do so is grounds for dismissal]; In re Winslow (D. Colo. 1990) 121 B.R. 598, 599 [appellant's failure to designate crucial portions of transcript constitutes grounds for dismissal].

Here, Goetz, on November 1, 2007, designated the entire docket for the underlying adversary proceeding to be included in the record on appeal, including transcripts for hearings dated June 12 and July 13, 2007. (**McGEE DECL.**, ¶ 4; **Exh. 3.**) As such, Goetz was required to immediately deliver to the reporter and file with the clerk a written request for the transcripts and make satisfactory arrangements for payment of its costs. **FRBP 8006**. Goetz failed to perform these acts and has not taken any steps to cure the same.

Given these circumstances, this Court should now dismiss Goetz's appeal from several reasons. First, there should be no doubt that the aforementioned transcripts, including especially the July 13, 2007 transcript, are necessary for Goetz's appeal. Indeed, the Bankruptcy Court's October 19, 2007

1 Order which ruled Mr. Challas' slander claim to be non-dischargeable since not within the parties' 2 "fair contemplation, was based upon the testimony provided during the July 13, 2007 "fair 3 contemplation" hearing. Simply put, the Order which Goetz is appealing is hardly intelligible without 4 reference to the July 13, 2007 transcript. Goetz's failure to timely procure the July 13, 2008 transcript 5 is grounds for dismissal alone. See, e.g., In re McCarthy, supra, 230 B.R. 414, 417.

6 **Second**, dismissal is appropriate since Mr. Challas, over the past few months, has repeatedly 7 advised Goetz regarding his failure to perfect his appeal, including by way of Mr. Challas' January 10, 8 2008 CMC statement filed in the Bankruptcy Court *and* his April 3, 2008 status conference statement 9 filed in this Court. Notwithstanding, Goetz has taken no action to perfect the record on his appeal or to 10 procure the crucial transcripts required by this Court.

11 **Third**, Goetz has now repeatedly failed to attend mandatory case management ad/or status 12 conferences. Goetz's repeated failure to make these mandatory appearances only underscores the fact 13 that he has no serious intent to prosecute his appeal.

14 **Fourth**, Goetz's failure to perfect his appeal plainly prejudices Mr. Challas. Mr. Challas's 15 slander action has been placed "on hold" for nearly two years now while the issue regarding the 16 dischargeability of the slander action wound its way first through the Bankruptcy Court and then 17 through this Court. It is now time that Mr. Challas be given fair opportunity to litigate that slander 18 claim which the Bankruptcy Court has determined to be non-dischargeable.

19 **Fifth**, Mr. Challas has legitimate concerns that Mr. Goetz may be using this period of 20 avoidance and delay to secret assets. As indicated above, even Goetz's own family sued him for the 21 fraud Goetz perpetrated against his own parents.

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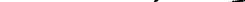
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IV. CONCLUSION

2 For the foregoing reasons, Mr. Challas respectfully requests that this Court now dismiss
3 Goetz's instant appeal.

5 | Dated: May 13, 2008

ELLIS, COLEMAN, POIRIER, LAVOIE, &
STEINHEIMER LLP

By  Van D. MEE

Daniel D. McGee

Co-Counsel for JOHN CHALLAS

CERTIFICATE OF SERVICE

I, Nichole M. Pruitt declare:

I am a citizen of the United States, am over the age of eighteen years, and am not a party to or interested in the within entitled cause. My business address is 555 University Avenue, Suite 200 East, Sacramento, CA 95825.

On May 13, 2008, I served the following document(s) on the parties in the within action:

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
APPELLEE/PLAINTIFF JOHN CHALLAS' MOTION TO DISMISS THE APPEAL BY
APPELLANT/DEFENDANT STEPHEN GOETZ**

X	VIA OVERNIGHT SERVICE: The above-described document(s) will be delivered by overnight service, to the following:
X	VIA ELECTRONIC SERVICE: The above-described document(s) will be delivered electronically through the Court's ECF/PACER electronic filing system, as stipulated by all parties to constitute personal service, to the following:

Stephen Goetz
13725 Robleda Road
Los Altos, CA 94022
(Via Overnight Delivery)

Debtor In Pro Per

George P. Eshoo, Esq.
Law Offices of George P. Eshoo et al.
702 Marshall Street, Suite 500
Redwood City, CA 94063
(Via Electronic Service)

Co-Counsel for John Challas

I declare under penalty of perjury under the laws of the State of California that the foregoing is a true and correct statement and that this Certificate was executed on May 13, 2008.

By Nichole M. Pruitt
Nichole M. Pruitt